

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SUNGARD SECURITIES FINANCE LLC : DECISION
 : DTA NO. 824336
for Revision of a Determination of for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period February 28, 2007 :
through May 31, 2009. :

Petitioner, Sungard Securities Finance LLC, filed an exception to the determination of the Administrative Law Judge issued on February 6, 2014. Petitioner appeared by Alston & Bird, LLP (Richard C. Kariss, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner did not file a reply brief. Oral argument was heard in New York, New York on September 17, 2014, which date began the six-month time period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether receipts petitioner derived from providing Lending Pit, Board Reporting and Performance Analytics services to its customers were properly subjected to sales tax under Tax Law § 1105 (c) (1) as receipts derived from sales of a taxable information service.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner, SunGard Securities Finance LLC, is a limited liability company organized under the laws of the State of Delaware and maintaining its headquarters in Salem, New Hampshire. Petitioner timely filed New York State and local quarterly sales and use tax returns for part-quarterly filers (Form ST-10). Petitioner is a subsidiary of Sungard Data Systems, Inc., (SDS or The SunGard Group).¹ Petitioner is engaged in the business of providing consulting and related data processing services to customers in the financial industry. Its customers include broker-dealers, custodian banks, third-party agency lenders and other financial institutions.

2. On April, 29, 2009, the Division of Taxation (Division) notified petitioner that it would be subject to an audit of its sales and use tax returns for the sales tax quarterly periods spanning December 1, 2006 through May 31, 2009 (the period at issue).

3. Following its audit, the Division issued to petitioner a notice of determination (L-035461959-4) dated February 28, 2011 and assessing tax due for the period at issue in the amount of \$397,065.28, plus interest. There is no dispute that petitioner maintained and made available records that were complete and adequate for purposes of conducting an audit. It is also undisputed that the audit was conducted upon the basis of a test period and projection method, as agreed to by the parties. Finally, there is no dispute as to the computation of the dollar amounts of tax assessed as the result of the audit. Rather, the issue presented is whether the Division

¹ The SunGard Group consisted of some 247 domestic and foreign subsidiaries, including petitioner, during the period at issue.

correctly concluded that the services giving rise to the receipts upon which tax was calculated were properly subject to tax.

4. The foregoing assessment involves tax determined due in the following specific component areas and amounts: Smart Loan (\$184,518.88), Lending Pit (\$163,660.73), Board Reporting (\$34,007.42) and Performance Analytics (\$8,501.86). The \$6,376.39 difference between the total of the foregoing specified component amounts (\$390,688.89) and the amount of tax assessed by the notice of determination (\$397,065.28) represents tax assessed on receipts from petitioner's Market Data Feed service and is not challenged or in dispute herein. Each of the component areas and amounts at issue will be discussed separately.

Smart Loan²

5. Petitioner provides its Smart Loan service to financial industry customers. The Smart Loan service is carried out pursuant to an Application Service Provider Agreement (Service Agreement) between petitioner and each of its customers. The Service Agreement describes the Smart Loan "system services" as follows:

Smart Loan is a modular system that supports and automates securities lending and borrowing, bank loans, short sale authorizations and profit/loss analysis. The system is designed to operate with SunGard's Loanet system on a real time basis. Smart Loan supports box lending, borrowing for house needs, provides special conduit screens, provides a real time copy of the Loanet open item database, and monitors credit limits on a real time basis. Smart Loan requires the Customer to subscribe to SunGard's Loanet Full Service.

6. Petitioner describes the main function of the Smart Loan service to be the processing and maintaining of ancillary accounting ledgers regarding petitioner's customers' securities lending and borrowing transactions. The Smart Loan service commences with petitioner's

² The issue regarding petitioner's Smart Loan Service is not before the Tribunal as it was determined in petitioner's favor by the Administrative Law Judge, and the Division did not except to such determination. However, the facts regarding petitioner's Smart Loan Service have been included in this decision as background.

receipt of data from a customer with respect to that customer's securities lending and borrowing transactions. The terms of the Service Agreement specify that in order for petitioner to meet its time requirements to its customers, the transaction data must be transferred from the customer to petitioner by 3:00 AM.³ In turn, petitioner provides data processing services and fulfills "back office" functions for its customers, including analyzing, processing and maintaining ancillary accounting ledgers regarding the customer's securities lending and borrowing transactions and making such information available to the customer's employees in various processed formats.

The process by which petitioner provides this service is carried out by:

- i) interfacing with the Depository Trust Company regarding the movement of collateral and securities between parties involved in securities lending transactions;
- ii) monitoring securities lending laws and guidance to ensure that the Smart Loan service complies with those laws;
- iii) providing customer help line support;
- iv) monitoring customer transactions to identify and/or resolve problems during the securities lending process;
- v) providing safeguards for customers' information and protecting against service interruption by maintaining backup generators, air conditioners, servers and a separate disaster recovery facility;
- vi) interfacing with third-party pricing vendors to properly value the securities lending transactions;
- vii) interfacing with its customers' third-party accounting/general ledger vendors to ensure that its customers' accounting records are properly updated;

³ Petitioner's Smart Loan service is available between the hours of 7:15 A.M. and 6:00 P.M. (*see* Finding of Fact 8), thus necessitating the requirement that customers' data must be transferred to petitioner by 3:00 A.M. (i.e., prior to such Smart Loan daily operating or availability time period).

- viii) maintaining account of its customers' lending transactions through ancillary accounting ledgers;
- ix) providing updates and enhancements of the Smart Loan system;
- x) coordinating third-party telecommunications providers to route information to the proper parties; and
- xi) archiving customer transaction data.

7. The foregoing functions are supported and performed by more than 25 employees, including:

- an information technology staff that monitors and services Smart Loan hardware;
- a client service group that supports customer communications;
- an operational staff that monitors the Smart Loan system;
- a communications department that monitors the high-speed connections with customers;
- a development group that includes computer programmers and system developers; and
- an administrative staff.

8. Petitioner delivers the Smart Loan service by using its employees, hardware and proprietary software to process customer data between the hours of 7:15 A.M. and 6:00 P.M., Monday through Friday. Petitioner does not deliver its Smart Loan service during its nonbusiness hours or on (SunGard) holidays, and these time-based limitations exist because petitioner's employees necessary to provide the data services are not available during such nonbusiness hours and holidays.

9. Petitioner's Smart Loan customers out-source the foregoing functions to petitioner in lieu of: a) purchasing specialized computer equipment and employing staff to maintain such equipment; b) contracting and interfacing with third parties for communications, pricing and movement of collateral; c) developing (and maintaining) a disaster recovery facility; and d) monitoring securities lending laws and guidance.

10. A customer's fee for Smart Loan services, billed via invoices labeled "Smart Loan ASP Services,"⁴ is based on the volume of unique services delivered to the customer and the number of the customer's personnel ("users") simultaneously receiving the Smart Loan service. More specifically, pursuant to the Service Agreement, there is a monthly fee determined by the number of simultaneous "Base System Users" plus an additional fixed monthly fee for each of several available "Optional Modules."⁵

11. Petitioner's customers cannot access or modify Smart Loan's proprietary data processing software. Petitioner, in its sole discretion and without notice to its customers, may modify, revise, and update the software it uses to provide the Smart Loan service.

12. The Smart Loan system incorporates a limited amount of software that petitioner uses to deliver processed data to its customers. This software is furnished to petitioner's customers for the exclusive purpose of providing a convenient means for petitioner's customers to view Smart Loan processed data. The main purpose of such software is to facilitate a secure connection between petitioner and its customers. This software cannot function independently of

⁴ "ASP" refers to "Application Service Provider."

⁵ The Base System Users fee decreases as the number of simultaneous users (SUs) increases (e.g., the monthly fee for one to five SUs is \$2,500.00 per SU, decreases to \$2,000.00 per SU in the case of six to ten SUs, and decreases to \$1,500.00 per SU in the case of 11 or more SUs).

the Smart Loan system, is provided to customers free of charge, cannot be altered or manipulated by petitioner's customers, and has no value apart from its relationship to the Smart Loan service.

Lending Pit

13. As part of its business, petitioner also offers a Lending Pit service to its financial industry customers. The service is delivered pursuant to a Subscription Order and Terms of Use Agreement (Subscriber Agreement). The Lending Pit service involves obtaining, compiling, analyzing, processing and maintaining pre-trade and post-trade data for customers to view over a secure internet connection using petitioner's proprietary web-based application. Using Lending Pit allows customers to view their own current lending data in comparison to their own historical lending data, as well as to view their own current and/or historical lending data in comparison with benchmarks formulated by petitioner using raw data from all of its customers. Lending Pit customers have the option of viewing their data in comparison to the benchmarks or in isolation.

14. Lending Pit operates by gathering, storing and processing customer-owned data using petitioner's proprietary custom software. Each Lending Pit subscriber agrees to make its data available at the close of each business day for inclusion in a database of such information, and petitioner, using its Lending Pit software, creates that database using its customers' information consisting of shares on loan, share weighted average of rebates, and a portfolio utilization percentage for each individual issue. Petitioner then allows its customers to view and analyze the database information in reports delivered via a secure internet connection using a web-based application. Data reports are formatted based on each customer's individual needs within pre-defined fields set by petitioner. The reports are based substantially on the customer's original

data, which is confidential, and the individual reports are returned solely to the customer and not sold or marketed to third parties.

15. Petitioner's press release and web page written descriptions of its Lending Pit service, captioned, "Market Color for Securities Lending Professionals," provides:

The securities lending market is among the fastest growing financial markets in the world, but it is also one of the least transparent. Lending Pit, from SunGard's Astec Analytics, is a browser-based market information service for securities lending professionals that provides increased transparency to the market. This service gives traders valuable rebate/fee and loan/borrow volume information for equity and fixed income issues on loan in every market.

Similarly, petitioner describes Lending Pit as:

a browser-based market information service for securities lending professionals. It is used on trading desks globally and gives traders valuable rebate/fee and loan volume information for a broad coverage of the equity and fixed income issues on loan in every market. Traders leverage this data to maximize their securities lending spreads in a market that can feature widely divergent rebate rates and fees, even for the same security on the same day. The data underlying Lending Pit is also available to Lending Pit subscribers who wish to analyze the data using in-house systems.

Petitioner's information concerning Lending Pit includes the quote claiming that "Lending Pit's securities finance analytical data is the nearest thing there is to real time data today," and answers the question, "How does Lending Pit add value to my business?" by stating:

Securities lending professionals leverage the information displayed on Lending Pit to maximize their lending revenue in a market that can feature widely divergent rebate rate and fees, even for the same security on the same day. Lending Pit is a valuable tool not only because it provides this fundamental market color, but also because it is designed with a trader's time constraints in mind. Lending Pit feeds the most pertinent data directly to the traders so that they are able to gain key insights quickly and with minimal effort. This is possible because the system is designed to be very user friendly, and also because the reports featured in Lending Pit are focused directly on securities lending profitability.

16. The key features of Lending Pit include:

- database infrastructure and application design 100% built, owned and maintained by SunGard;
- data updated each morning with loans that were outstanding as of the market open;
- graphical representation for quick data interpretation;
- sub-second response time to crucial pre trade queries;
- view and download up to 15 months of historical data;
- red flag service to identify positions whose rebates differ significantly from market averages;
- user definable watch lists; and
- research sectors/industries for profitable lending opportunities.

17. Customers are not required to view the database (market) benchmarks petitioner establishes, and petitioner does not impose an additional charge on its customers for viewing the benchmarks. The Lending Pit service incorporates an amount of market data from public sources for the purpose of allowing Lending Pit customers to compare their own data to the market data. Petitioner's customers are not provided access to any of the raw data used to create the benchmark comparison reports.

18. Lending Pit customer data is stored in an online data warehouse with logical separation and access for each customer. Therefore, individual customers cannot access the confidential data of other individual Lending Pit service customers. To ensure confidentiality, individual customer data is further protected through external and internal nondisclosure agreements that prevent such customer-specific individual data from being included in reports furnished to other customers of the Lending Pit service.

19. Lending Pit allows customers to view and/or download up to 15 months of historical lending data. A customer can access its own data for the purpose of creating reports, but cannot access the confidential individual data of other Lending Pit customers from which the benchmarks are derived. Lending Pit customers cannot download the reports that Lending Pit creates and makes available for its customers on petitioner's servers, but rather those customers are permitted to download only the data that is included in the reports. Customers may view any downloaded data on customer-owned software, such as Microsoft Excel.

20. Petitioner does not sell or license the software it uses to provide the Lending Pit service. It does not transfer its proprietary software to its customers, and its customers cannot download or install Lending Pit software on their own computers.

Board Reporting

21. As part of its business, petitioner provides a Board Reporting service to its customers in the financial industry, including broker-dealers, custodian banks, third-party agency lenders and other financial institutions. Board Reporting is a component part of petitioner's Lending Pit service. Petitioner states that the main function of the Board Reporting service is to advise customers on the relative quality of their securities lending programs. As the "Board Reporting" name implies, the service provides a report to a customer's board of directors, or to a manager or management unit within a customer, concerning the customer's securities lending program.

22. Customers purchase the Board Reporting service to obtain an impartial evaluation of their lending activity. The resulting evaluation is provided by petitioner's employees, who review data from the customer's securities lending programs and draw conclusions regarding whether the program is appropriate, valuable and structured within industry standards during a defined

period of time. The evaluation includes reviewing the performance of the customer's securities lending program data against market performance benchmarks, as derived from the information in petitioner's Lending Pit database.

23. Petitioner delivers its Board Reporting conclusions to its customers via a written document entitled, "Report to Management." The report may include advice for steps that could be taken to improve the customer's program. The advice and guidance included in the Board Reporting reports are developed by petitioner's professional staff. These employees are described as highly experienced business analysts trained in the metrics of the securities lending industry.

24. The Board Reporting Reports to Management are produced by petitioner on an "as needed" basis and vary depending on frequency and content according to the needs of each customer.

Performance Analytics

25. As part of its business, petitioner also provides a Performance Analytics service to its customers in the financial industry. Petitioner's Performance Analytics service is a component of the petitioner's Board Reporting service, which is itself a component part of petitioner's Lending Pit service. Performance Analytics can be purchased independently of the Board Reporting service. Petitioner states that the main function of the Performance Analytics service is to evaluate a customer's lending program in the context of comparing that customer's results with the results of other securities lending agents using petitioner's proprietary scoring model.

26. Through the Performance Analytics service, petitioner's professional staff identify financial industry trends including:

- prevailing lending rate trends;
- trends in the volume of loans;
- trends in the stability of loans; and
- trends in the distribution of loans among borrowers.

27. Petitioner delivers its Performance Analytics conclusions to its customers through a written document entitled “Earning Results and Lending Trends.” If the Performance Analytics service is purchased in conjunction with the Board Reporting service, petitioner will incorporate the Performance Analytics comparison metrics in the Board Reporting “Report to Management.”

28. Certain of the foregoing facts concerning Smart Loan and Lending Pit are taken from information set forth in an affidavit made by John Grimaldi, petitioner’s executive vice president for capital markets and investment banking. Mr. Grimaldi has over 30 years of experience in corporate securities lending and treasury operations, including the period from 1995 through 2001 when he worked for Loanet, the predecessor firm acquired by SunGard in 2001. Certain of the foregoing facts concerning Board Reporting and Performance Analytics are premised upon information set forth in an affidavit made by Timothy Smith, petitioner’s senior vice president and general manager for SunGard’s Astec Analytics.

29. Petitioner submitted proposed findings of fact numbered 1 through 73, and three proposed conclusions of law numbered 74 through 76. In accordance with State Administrative Procedure Act (SAPA) § 307 (1), the following rulings are made with respect thereto:

- a) proposed facts numbered 1 through 26, 29 through 33, 35 through 40, 44 through 50, 52 through 54, 56 through 67 and 69 through 72 are supported by the record and have

been substantially incorporated in the foregoing Findings of Fact;⁶

- b) proposed facts numbered 27, 34, 43, 51 and 73 are each rejected as setting forth an ultimate finding of fact thus constituting a conclusion of law;
- c) proposed facts 41 and 42 are rejected as being conclusory in nature;
- d) proposed fact 55 has been modified to accurately reflect the record by specifying that Lending Pit displays not only a customer's own data but also displays information from the aggregate data (the database) of all customers' information (*see* Ex. F at pp. 221, 225; Findings of Fact 14, 15 and 16);
- e) proposed fact 68 has been modified to eliminate the descriptive quantity term "de minimis"; and
- f) SAPA does not require rulings with respect to proposed conclusions of law and none have been made herein concerning petitioner's three proposed conclusions of law numbered 74 through 76.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that Tax Law § 1105 (c) imposes sales tax upon all receipts from the services of furnishing information "including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." The Administrative Law Judge then noted that while a statute seeking to impose a tax is construed "most strongly against the government and in favor of the citizen," petitioner still has the burden of proving that the services it provided were not information services. (*Matter of Building Contrs. Assn. v Tully*, 87 AD2d 909, 910 [1982] [citations omitted]). The

⁶ Many of the proposed facts as presented by petitioner have been condensed and renumbered as incorporated in the findings of fact set forth above. In addition, it is noted that proposed facts numbered 8 through 10 and denominated procedural facts are undisputed and are unnecessary to resolution of the substantive issues presented in this matter.

Administrative Law Judge concluded that petitioner's primary function and true aim was the business of furnishing information, and that petitioner had not proven that the provision of such information was merely a component part to the provision of some other primary service.

The Administrative Law Judge went on to review petitioner's argument that even if Lending Pit was in the business of providing an information service, it was not a taxable information service. The Administrative Law Judge concluded that the information provided by Lending Pit to its customers was not personal or individual in nature and, indeed, was available to other customers either in aggregate form or through inclusion in various reports. Therefore, the receipts that Lending Pit received from its customers for the provision of the information service at issue were subject to sales tax pursuant to Tax Law § 1105 (c) (1).

With regard to Board Reporting and Performance Analytics, the Administrative Law Judge found that petitioner did not prove that such services constituted nontaxable consulting services. Furthermore, the Administrative Law Judge found that as available component parts of petitioner's Lending Pit service, the information provided by these services also consisted primarily of the customer's own data coupled with the database of information collected from all of petitioner's customers. Therefore, such information could not be found to be personal or individual, nor could it be said that such information was not or would not be substantially incorporated in reports furnished to others.

ARGUMENTS ON EXCEPTION

On exception, petitioner does not argue that the Lending Pit, Board Reporting or Performance Analytics do not provide information services as that term is defined in Tax Law § 1105 (c) (1), but only that the information provided to their customers is individualized in

nature and is not substantially incorporated in reports provided to other customers, thereby excluding from tax the receipts from such information services.

With regard to Lending Pit, petitioner asserts that the Administrative Law Judge incorrectly found that information received by petitioner from each of its customers was available to all of its customers in raw aggregate form or as analyzed by petitioner. Furthermore, petitioner states that the analysis of an individual client's portfolio, based upon that client's raw data, is an essential component of every Lending Pit report. Based upon these two facts, petitioner urges the conclusion that the information provided to its customers was clearly personalized information that could not be incorporated in reports provided to other customers, and that therefore its receipts from the sale of the Lending Pit information services were not subject to sales tax.

With regard to Board Reporting and Performance Analytics, petitioner asserts that the Administrative Law Judge incorrectly noted that no actual reports from these services were provided for review either on audit or at the hearing. Petitioner counters that redacted copies of such reports are part of the record and show that the information provided to customers is an individualized analysis of a customer's portfolio that cannot be incorporated in reports provided to other customers.

The Division argues that the information provided by all of the services at issue to petitioner's customers consisted of the data of an individual customer together with the data from all Lending Pit customers, and therefore is not individual in nature. Furthermore, as such data was available to all subscribers in either raw aggregate form or as analyzed by petitioner, the Division asserts that the Administrative Law Judge correctly held that the information provided was not individual in nature nor information that was not substantially incorporated in other reports.

The Division also objects to petitioner's quoting in its brief in support of its exception several publications that had not been introduced as evidence at the hearing in this matter.

OPINION

The only question before us is whether petitioner has proven that the information provided by the Lending Pit, Board Reporting and Performance Analytics services to its customers is “personal or individual in nature and [which] is not or may not be substantially incorporated in reports furnished to other persons” (Tax Law § 1105 [c] [1]). If so, receipts from the information services provided by Lending Pit, Board Reporting and Performance Analytics are not subject tax pursuant to Tax Law § 1105 [c] [1]. As noted by the Administrative Law Judge, while we are guided by the rule that statutes seeking to impose tax are construed “most strongly against the government and in favor of the citizen,” petitioner still has the burden of proving that the services it provided were not information services (*Matter of Building Contrs. Assn. v Tully*, 87 AD2d at 910 [citations omitted]; Tax Law § 1132 [c] [1]).

Petitioner in this matter chose not to submit any documents into evidence, or to present any testimony in support of its petition. Rather, petitioner relied upon the Division's documentary exhibits E (Field Audit Report and correspondence) and F (Audit Workpapers), which included documents that petitioner had submitted to the Division during the audit, and two affidavits from people familiar with its operations. A review of these documents reveals inconsistencies between the affidavits submitted by petitioner and the documents contained in the Division's exhibits E and F, and also some inconsistencies between documents within the exhibits.

The foundation of petitioner's case on exception is that, with limited exceptions, the Administrative Law Judge was incorrect in his findings that customers were allowed access to anything but their own data. Relying primarily upon the affidavit of John Grimaldi and

characterizations contained in correspondence that it submitted to the Division on audit, petitioner describes Lending Pit's business as follows: Lending Pit accepts data from its customers, analyzes that data, and returns that same data to the customer in a more useful form. However, petitioner does acknowledge that customers may, but are not required to and are not charged for, access benchmarks created from all of the data collected from all of its customers and that it also utilizes some market data from public sources for comparison purposes.⁷ (*see* Findings of Fact 13, 14, 17 and 19).

The documents included in the Division's exhibits E and F stand in contrast to petitioner's position. For example, pursuant to the Subscriber Agreement contained in Division's Exhibit F, Lending Pit's customers agreed to make their lending data available at the close of each business day with the understanding that Lending Pit would have the right to maintain a database of that information in the aggregate form and *use that data in the aggregate form for its analyses and distribution of information* (*see* Findings of Fact 13, 14 and 19).

Furthermore, petitioner's portrayal of Lending Pit's product as the customer's data returned to it in a more usable form, differs from the Lending Pit information service as described by petitioner's press release and web page, wherein the product is touted as providing its customers with "valuable rebate/fee and loan/borrow volume information *for equity and fixed income issues on loan in every market*" (*see* Finding of Fact 15 [emphasis added]). Traders then "leverage this data to maximize their securities lending spreads in a market that can feature widely divergent rebate rates and fees, even for the same security on the same day" (*id.*). Furthermore, "*data*

⁷ The Administrative Law Judge refused to quantify the use of data from public sources as de minimis as requested by petitioner because such a finding was not supported by the record. We agree.

underlying Lending Pit is also available to Lending Pit subscribers who wish to analyze the data using in-house systems” (id. [emphasis added]).

Based upon the record in this matter, we see no basis for overturning any of the findings of the Administrative Law Judge holding that Lending Pit customers receive more than just their own data back in another format. While it is true that the reports a customer receives from Lending Pit are based substantially on the customer’s own data, it is also true that such reports contain a substantial amount of other information. To hold otherwise would be incongruous with Lending Pit’s own description of its business as providing “valuable rebate/fee and loan/borrow volume information for equity and fixed income issues on loan in every market.” Similarly, a holding that one customer’s data is not utilized by other customers would be incongruous with petitioner’s statement that the “data underlying Lending Pit is also available to Lending Pit subscribers who wish to analyze the data using in-house systems.” Petitioner’s own Subscriber Agreement, while requiring its customers to agree to keep the information they receive confidential, also requires its customers to agree that petitioner has the right to utilize, analyze and distribute their data in aggregate form (*see* Findings of Fact 13, 14, 15, 17 and 19). In short, if there was any misconception of petitioner’s business by the Administrative Law Judge, it was caused by petitioner’s failure to adequately explain and document the discrepancies in the record.

Having upheld the factual findings of the Administrative Law Judge in this matter, we find petitioner’s arguments on exception unpersuasive. In order for the receipts from Lending Pit’s information service not to be taxable, petitioner had to prove that the information provided to customers is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons (Tax Law § 1105 [c] [1]). Petitioner has not met its burden in this case.

As discussed above, petitioner's own description of Lending Pit's services in its literature is at odds with its position in this matter that what was returned to the customer was, with the exception of the benchmarks, merely petitioner's own data in a different form. Some market data from public sources was included in the reports provided by Lending Pit to its customers. Therefore, while each customer did get an individualized report, much of the information in that report came from the database compiled by petitioner that was also utilized to prepare reports for all of Lending Pit's customers (*see Rich Prods. v Chu*, 132 AD2d 175 [1987], *lv denied* 72 NY2d 802 [1988] [exclusion does not apply where common database contained industry information used for reports to all customers, even though customer requested what specific information was to be included in its report]; *compare Westwood Pharms. v Chu*, 164 AD2d 462, 464 [1990], *lv denied* 77 NY2d 807 [1991] [exclusion does apply where there is a separate database used only for the preparation of individual customer's report and that report and that customer's information "is never included in market reports furnished to other clients"]).

Furthermore, there is no question that information in one customer's report may be available to other customers. As noted above, Lending Pit's customers specifically agree that the information they make available may be utilized, analyzed and distributed by petitioner. Furthermore, while Lending Pit customers cannot access the individual data of other customers in isolation, they can access the aggregate of such data as collected and compiled by petitioner.

The information provided by Lending Pit is not personal or individual in nature, and such information may be incorporated in reports provided to other customers. Therefore, the receipts from Lending Pit's services are subject to tax pursuant to Tax Law § 1105 (c) (1) (*see Towne-Oller & Assoc. v State Tax Commn.*, 120 AD2d 873 [1986] [information service not individual in nature where petitioner utilized common database to prepare all reports even though

some reports were prepared at the request of a particular customer to identify distribution problems for their particular products]).

Finally, we see no reason to differentiate the services provided by Board Reporting and Performance Analytics. Petitioner implies that had the Administrative Law Judge properly found that redacted copies of reports from each service were included in the record, he may have reached a different conclusion regarding the taxability of its receipts from such services. However, even assuming that petitioner established the reliability of the documents in Division's Exhibit F entitled, "Securities Lending Program Evaluation" and "Securities Lending Review," such documents do not assist petitioner in making its case. Even more so than the Lending Pit service in general, a review of these documents indicates that these services provide advice based upon comparisons to market data that is generated by petitioner's Lending Pit database.⁸ Thus, it cannot be said that the information is uniquely personal or individual, or that a substantial amount of such database information is not and may not be substantially incorporated in reports furnished to others (*see Matter of Rich Prods. v Chu*).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of SunGard Securities Finance LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of SunGard Securities Finance, LLC is granted to the extent indicated in conclusion of law E of the determination of the Administrative Law Judge, but is otherwise denied; and

⁸ Likewise, we see no need to address the Division's objection to petitioner's quoting in its brief in support of its exception several publications that had not been introduced as evidence at the hearing in this matter. Those cites were made by petitioner in support of its position that participants in the securities lending market do not have the same publicly available market information as participants in other markets. Such point is understood in that it is the basis of petitioner's business and reason for the creation of the Lending Pit database.

4. The notice of determination dated February 28, 2011, as modified in accordance herewith, is sustained.

DATED: Albany, New York
March 16, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner